No. 12,066

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTOPULOS and JOAN FOTOPULOS, minors, by and through their guardian ad litem, Diamond Fotopulos,
Appellees.

BRIEF FOR APPELLANT.

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STATEMENT OF THE CASE.

Nature of the Case.

This is a suit under the "Federal Tort Claims Act". Peter Fotopulos was driving a 1936 Dodge Pick-up Truck in a northerly direction on Van Ness Avenue, San Francisco, near the intersection of Van Ness Avenue and Bush Street. The Government's employee was driving a Chevrolet truck known as a ton and a half, 6 x 6, in the same direction. The Government vehicle stopped at Sutter Street and Van Ness Avenue, then proceeded approximately 15 miles per hour

toward Bush Street along the inner lane on the east side of Van Ness Avenue.

Then the contention of the parties differ. Appellant contends that Fotopulos' truck was proceeding behind the Government truck but in the outer lane of the east side of Van Ness Avenue, until it approached the safety zone (marked with white lines) near the intersection of Van Ness and Bush Streets and which extends along the eastern street car track and ends at the intersection. As Fotopulos was about thirty or forty feet from the intersection, he turned his truck to his left immediately in front of the Government vehicle. The Government driver, as Fotopulos cut in front of him, applied his brakes and slowed the vehicle to such an extent that he hit Fotopulos' vehicle only hard enough to break the tail light and hinges of the tail light, if it did that. There was no damage to the fenders of Fotopulos' vehicle (R.T. 72-76). The impact did not knock off the mud on the Government vehicle and caused no damage to it except some paint was scraped off the right side of the front bumper (Tr. 109.) That therefore Fotopulos was negligent. The damages to Fotopulos' truck was so slight that no claim was made or proven. However, the damages were complicated by Peter Fotopulos dying after an operation on January 10, 1947. The accident happened on December 23, 1946. The Government contends his death was not the result of this accident.

Appellee contends that Fotopulos was driving his truck on the inner lane and stopped his truck at the crosswalk of the intersection, and when he stopped, the

Government vehicle collided with the rear of Fotopulos' truck, forcing his vehicle into the car ahead and caused injuries to Fotopulos that resulted in his death.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

That the trial Court erred:

1. In finding the defendant United States of America negligent in the operation of its vehicle;

2. In finding Peter Fotopulos was not guilty of contributory negligence;

3. In finding that his death was caused by the collision;

4. In excluding evidence of other accidents or sickness;

5. In not finding how much of the disability resulted from the injury and what disability resulted from other causes;

6. In awarding excessive damages;

7. In that there is insufficiency of evidence to justify the trial Court's decision.

AS TO THE FINDING THAT THE UNITED STATES WAS NEGLIGENT IN THE OPERATION OF ITS VEHICLE, AND/OR THAT PETER FOTOPULOUS WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

The appellee produced no eye witnesses. The Government produced two—the Army driver of the Government vehicle and a man riding in the Government vehicle. The driver, C. A. Bailey, had been discharged and was working as a moulder with the Prophylactic Brush Co. at Florence, Massachusetts. His testimony supported the contention of the Government as set forth hereinabove, to-wit: (Figures refer to Reporter's Transcript unless otherwise indicated.)

Fotopulos was driving in the extreme right lane. Bailey was driving in the inner lane (127). Fotopulos cut from the right lane into the lane in front of him. There was no way to avoid hitting him (128). Bailey was going approximately fifteen to eighteen miles per hour before the accident. He did not notice the stop signal as he did not get that far before Fotopulos cut in front of him, and at that time he thought only of stopping. He immediately applied his brakes (130). Fotopulos gave no signal (131). Bailey reduced his speed as he approached the intersection (132). Fotopulos was going faster than Bailey. The right front of the Government vehicle came in contact with the left rear of Fotopulos' vehicle (133). Fotopulos said he wasn't injured (135). The cross-examination apparently made no difference in his testimony (136 through 151 and 153 through 162). The chart referred to in this deposition is Plaintiff's Exhibit 3) (141).

Bailey did not see two men run to the scene of the accident (155). The right end of the front bumper of the Government vehicle had a crease in it about fifteen inches, which was all the damages to the Government vehicle (155). The rear of Fotopulos' vehicle hardly had a mark on it. The top part of the grille was punched back (157). This may have been caused by Fotopulos hitting a truck before this impact (147-134). There was no damage to the mudguard of Fotopulos' car.

The Government witness, Hammond, was not present in Court on December 5, 1947, due to illness. The medical statement in the record showed he would be available any time after December 8, 1947. The Government desired to produce him in Court. However the appellee desired to read the deposition of the witness instead of waiting until December 8, 1947 (122) and it was read (166). Hammond testified that a Dodge '36 Pickup Truck came up alongside of the Government vehicle and cut into the lane in which the Government car was being driven (167). As the Government vehicle approached the intersection it slowed down because of the stop signal (as he considered it), then the Dodge '36 truck came up on the right of the Government vehicle and cut into the Government vehicle's lane. At that time the Government vehicle was traveling about ten miles per hour (170) and Fotopulos was traveling between fifteen and twenty miles per hour. The Government vehicle's right front hit the Dodge vehicle left rear. The picture showing the "crease" on the Government vehicle's right front bumper was of-

fered in evidence and marked "Defendant's Exhibit A" (171-173). Defendant's Exhibit B shows the Dodge truck. It was stipulated that any damages shown on the truck was not the result of this accident (175); that the Dodge truck when hit was "kind of across the lane, setting kind of crossways" (177); that Bailey threw on his brakes as soon as he saw Fotopulos cutting in front of him. He knocked it against the truck ahead, just hardly bumping it (18). Fotopulos did not give any signal (179) nor did he complain of any hurts (180). Bailey stopped at Sutter and Van Ness (183). The speed of the Government vehicle was about fifteen miles per hour between Sutter and Bush. It was in second gear (184). The Government vehicle did not hit Fotopulos' vehicle in center of the rear (191). The right rear part of Fotopulos' vehicle was not damaged (192). The Dodge truck of Fotopulos was not in the safety zone. It did not get that far over the line (195). The witness had not seen Bailey since the accident. The Government vehicle did not hit the Dodge truck with very much force (198). The mark (crease) on the Government vehicle was not there before the accident (201).

Against this testimony of two actually uninterested eye witnesses, widely separated and without having discussed the matter between them, is the testimony of two uninterested witnesses of the appellee who did not see the accident.

Justin L. O'Neil testified for appellee: he was in his office and he heard a crash (88). He walked to the front of the door and walked out in the street where

the vehicles were. When he got there the one vehicle was behind the other. The front of Fotopulos' vehicle (the grille) had been pushed in, but whether that had been done by this accident, he did not know (89). There was no car in front of Fotopulos' vehicle. The damage to Fotopulos' vehicle was possibly more on the left side. Fotopulos' vehicle was parallel to the track and the Government vehicle might have been a little bit to the left behind Fotopulos' vehicle. The vehicles were about eight or nine feet apart when he got there (90). The front end of the Dodge truck was in the cross-walk. The Government vehicle was more to the west, or left (91-92). He never saw any vehicle in front of the Dodge truck (93). He did not spend much time in observing the accident (94). He did not observe any damages to the Dodge truck except the tailgate and the body seemed to be bent. He did not observe any damages to the Government vehicle although he looked at it. He did not see any mud knocked off the Government vehicle. The damage to the Dodge truck was more to the left than center (95).

Harry A. Faelor testified for appellee: he was in Neil McNeil's office sitting at a desk when he heard a crash (77). The Government car was directly behind the Dodge truck. He did not know if the red light was on at that time (79). Fotopulos was arguing with "them" (who?). The fellow said "Well the brakes did not hold, *or I couldn't help it*" (Italics ours). There were three of them arguing (86). O'Neil was with him. Whether the "Stop" and "Go" signals at Van Ness and Bush can be seen by an auto from Sutter Street

depends on whether a street car is in the line of vision. If no street car, he did not know if it could be seen. He did not see any truck ahead of Fotopulos' vehicle (80). He did not observe any damage to the front of Fotopulos' vehicle but he noticed the rear tailgate was smashed and it was bent in the middle (81). (The Court will observe that the tail-light is on the left rear of the Dodge truck.) He walked between cars that were parked at the curb, to the scene of the accident. He saw Fotopulos come into his place of business. Fotopulos wanted to use the telephone. As Fotopulos walked into the building he was standing in front, in the doorway (85). Fotopulos did not appear to be injured.

John Duba testified for appellee:

No evidence of damage to the rear fenders of the Dodge truck although the fenders protrude beyond the body of the truck. He did not know if the tailgate had been damaged in this accident although they replaced the tailgate and the rear taillight lens (73).

On cross-examination he stated: He examined the Dodge truck and found that the frame members of it had been so badly corroded that it was paper thin; that heavy metal had been placed on the floor of the body of the truck and that when the frame buckled, the extra weight of this metal plate caused damage to the cab and broke the motor support. The gas tank, because of the corrosion, had to be replaced but it had nothing to do with the accident. The whole chassis was badly corroded (74). Most of the damages and repairs

were caused by the corrosion. The only damages he could find that could have been caused by the accident were the damages to the tailgate and the hinges of the rear tailgate (75). The Court will notice that the damages were so slight that no claim for damages to the vehicle was claimed or proven.

It is submitted, as a matter of law, that the trial Court should, in view of the testimony, find that Fotopulos was guilty of, at least, contributory negligence, and when the slightest contributory negligence is shown, that the appellee, as a matter of law, cannot recover.

> "The plaintiff is held not to be entitled to recovery if he was 'guilty of contributory negligence, *however slight',* even though the defendant may have been 'most to blame'.
>
> "Any negligence on the part of the plaintiff which contributes even in a *slight degree* to the accident is contributory negligence, barring a recovery; and it is error for the Court not to instruct the jury to such effect".
>
> 2 *Cal. Jur. Supp.* 170, referring to
>
> *Markham v. Hancock Oil Co.,* 2 C.A. (2d) 392, 37 Pac. (2d) 1087, and other cases.

In

> *Texas Co. v. Hood, et al.,* 161 Fed. Rep. 2d Series 618 (CCA-5).

(which was a somewhat similar case in which a truck and plaintiff's auto collided and the plaintiff's husband was killed, the only eye witnesses being that of defendants), the Court said (620):

> "The circumstances sought to be shown by plaintiff, even if all were admitted to be proven, are entirely consistent with the positive, uncontradicted and unimpeached testimony of the three eye witnesses as to how the collision occurred, where two equally justifiable inferences may be drawn from the facts proven, one for and one against the plaintiff, neither is proven and the verdict must be against him who had the burden of proof * * *. Moreover, where the plaintiff's right of recovery depends upon the existence of a particular fact being inferred from proven facts, such inference is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses whose testimony is consistent with the facts actually proven and which uncontradicted evidence shows affirmatively that the facts sought to be proven did not exist * * * no lawful finding can be made of its existence * * *"

That if there is doubt as to whether the one party or the other was in a better situation to prevent the impact, the conclusion that both parties were responsible seems logical (See 2 Cal. Jur. Supp. 158).

A long line of decisions in California has established the rule that

> "The failure of a person to perform a duty imposed upon him by law is negligence per se and if such negligence proximately contributes to his injury, he cannot recover".
>
> *Hardin v. Sutherland,* 106 C.A. 479 (289 P. 900).

The uncontradictory evidence shows that Fotopulos violated the law and that his violation proximately contributes to his injuries. The only material evidence of the appellee witnesses was the position of the vehicles after the accident and from their own testimony, after their rather casual inspection, they had been moved, as O'Neil testified, and were eight or nine feet apart.

Sec. 526 of the Vehicle Code of California, states as follows:

> "526. Driving on Roadways Laned for Traffic.
>
> Whenever any roadway has been divided into three or more clearly marked lanes for traffic, the following rules in addition to all others consistent herewith shall apply:
>
> (a) A Vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety".

AS TO THE FINDING THAT PETER FOTOPULOS' DEATH WAS CAUSED BY THE COLLISION.

It is apparent that not a very hard blow was struck by the impact of the two vehicles. Not even the fenders of Fotopulos' vehicle was damaged and the only damage to his vehicle was a possible broken tailgate. The only damages to the Government vehicle was a slight crease or scratch on its right front bumper.

It is believed that medical testimony, when analyzed, does not point to the impact as bringing into exist-

ence the matter which caused Mr. Fotopulos' death. Dr. Ryan gave a history of generalized peritonitis. The various medical reports tend to show Mr. Fotopulos' death was caused by a diverticulitis, that is, a protrusion of the mucosa through the walls of the large bowel, and that these perforate rather frequently. Dr. Ryan's opinion was that his death was the result of the condition of Mr. Fotopulos' bowel. There was no visible evidence of any blow or external injury.

Mr. Fotopulos was Dr. Wirtheim's patient. Fotopulos came to see him January 3, 1947. He said he had some kind of discomfort in his stomach. Dr. Wirtheim examined him. He had no symptoms of vomiting or peritoneal, no external injury which would make possible a rupture or a severe injury to the bowel. He had no fever. It was only a possibility that his death was caused by a blow on the abdomen.

THE COURT ERRED IN EXCLUDING EVIDENCE OF OTHER ACCIDENTS OR SICKNESS.

The following question was excluded:

"Q. Mrs. Fotopulos, Mr. Fotopulos had two accident and sickness policies with the Occidental Life Insurance Company?

Mr. Bucher. I object to that, if the Court please. I can't see any relevancy between that question and this case as to whether he had any sickness or accident policies.

The Court. Sustained."

The question laid the foundation for showing that (if so) Mr. Fotopulos had received compensation for other sickness or accidents. It also went to the question of the amount of damages, for if the appellee had recovered from an Insurance Company, it could not recover from the Government.

THE COURT ERRED IN NOT FINDING HOW MUCH OF THE DISABILITY RESULTED FROM THE INJURY AND WHAT DISABILITY RESULTED FROM OTHER CAUSES.

When the disability sustained is contributable both to injury and other causes, such as diseases, etc., the evidence must *make clear* how much of the disability proceeds from the injury in order for plaintiff to recover at all.

McCormick on Damages (1935) 273.

Appellant contends that the slight impact was not the sole cause of Fotopulos' death; that the trial Court should have found how it arrived at its conclusion that the impact was the sole cause and how it eliminated other causes that may have contributed to them.

THE COURT ERRED IN AWARDING EXCESSIVE DAMAGES.

Fotopulos was forty-nine years old. He had not paid any income tax before 1940. His average income from 1940 to 1943, inclusive, was approximately $5700. Then during the war years (1943 to 1946) his average income jumped to approximately $16,000, which is believed abnormal.

The Court is not bound by expectancy of life according to mortality tables.

Harrison etc. v. Sutter Street Railway Co., 116 Cal. 156.

It would appear at Fotopulos would not have continued to earn as much as during the war years. His health and vigor and whether he would be continually employed are some circumstances to be considered. His death under the circumstances herein may be also noted. He had borrowed money on mortgages prior to the war years.

In

Spell v. United States, 72 Fed. Supp. 731,

$15,000 was awarded for the wrongful death of a motorist.

The damages in this case are limited to pecuniary loss and not for grief or mental suffering. Fotopulos' income tax statements were subject to the reduction for his expenses due to personal and maintenance charges to arrive at a net income for this case.

Dated, San Francisco, California,
May 2, 1949.

Respectfully submitted,
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